IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 384 OF 2004

Smt. Latabai Narcinha Telang,
widow of Narcinha Telang,
major, landlady, r/o. House No.108,
Zambaulim, Sanguem, Goa. ..... Petitioner.

V/s.

1. Shri Suresh Narcinha Telang,
married, of full age,
Curchorem, Quepem, Goa.

2. Shri Milinda Vaman Sinai Kudchadkar,
major, Bagwada, Curchorem, Goa. ..... Respondents.

Mr. A.A. Agni, Advocate for the petitioner.

Mr. S.G. Bhobe, Advocate for respondent No.1.

Respondent No.2 though served, absent.

CORAM : A.P. LAVANDE, J.

DATE : 6TH MAY, 2005.

ORAL JUDGMENT :

Heard Mrs. Agni, for the petitioner and Mr. Bhobe for respondent No.1. Respondent No.2 though served, is absent. Rule. Mr. Bhobe waives notice on behalf of respondent No.1. By consent heard forthwith.

2. By this petition, the petitioner challenges Order dated 16th June, 2004, passed by the Addl. District Judge, South - Goa at Margao, dismissing Civil Misc. Application No.109/2002/II.

3. Briefly, the facts which are relevant for disposal of this petition, are as follows :

In Regular Civil Appeal No.58/96, in which the petitioner was the appellant, consent terms were filed which were signed by both the parties and decree dated 3.7.1998 was passed by the Addl. District Judge, Margao, in terms of the consent terms filed. According to the petitioner, the respondent No. 1 did not pay Rs.500/- per month to the petitioner in terms of the consent terms. The petitioner, therefore, issued notice dated 11.4.2004 calling upon respondent No.1 to pay to the petitioner a sum of Rs.11,000/- being the arrears of maintenance from July, 1998 to April, 2000. The respondent No.1 claimed that he was liable to pay only Rs.500/- per annum. Thereafter, the petitioner checked the consent terms and the Decree and realised that instead of Rs.500/- per month, one of the consent terms mentioned Rs.500/- per annum. Thereafter, the petitioner filed an application under Section 152 C.P.C. for correction of such typing mistake in the consent terms as well as the consent decree. The same was dismissed and the revision preferred by the petitioner before this Court bearing Civil Revision Application No. 70/02, was permitted to be withdrawn, with liberty to file

an application under Order 23, Rule 3 of C.P.C. Thereafter, the application under Order 23, Rule 3 C.P.C. was filed with the following prayer :

> " That this application be allowed and consent terms/decree be modified by introducing the word per month in place of per annum thereby making the liability to pay maintenance by the respondent No.1 to the applicant on monthly basis instead of yearly basis."

After hearing both the sides, the Additional District Judge passed the impugned Order dismissing the application on various grounds. The Addl. District Judge has, inter alia, held that the applicant had neither examined herself, nor Advocate Navelkar who had filed affidavit in support of her case; that there was delay in filing the application; and that there is no power to modify the consent terms unless all the parties agree to the same. The petitioner by filing this present petition has challenged the said order dated 16.6.2004.

4. Mrs. Agni, learned Counsel appearing for the petitioner, at the outset, submitted that the application was maintainable under Order 23, Rule 3 of C.P.C.. She further submitted that the Decree was based on consent terms and, therefore, the same could be set aside on the grounds on which the agreement can be set aside under the provisions of the Indian Contract Act. According to the learned Counsel, the Addl.

District Judge could not have dismissed the application on the ground that the petitioner had not examined herself or Advocate Navelkar, without holding an inquiry. According to the learned Counsel, in the event, the learned Addl. District Judge was inclined to hold that the applicant and/or Advocate Navelkar had to be examined, the learned Addl. Judge ought to have held an inquiry by calling upon the parties to lead evidence before deciding the issue. According to the learned Counsel, a part of the consent terms could be rectified and, in support of this she relied upon Section 26 of the Specific Relief Act. In support of her submissions, the learned Counsel relied upon the following Judgments:

(1)***Banwari Lal v. Smt. Chando Devi (thrugh L.R.) and anr.;*** (AIR 1993 SC 1139);

(2) ***Ruby Sales and Services (P) Ltd. vs. State of Maharashtra and ors***. ((1994) 1 SCC 531);

(3) ***Shripatrao Dajiso Ghatage and anr. vs. Usman Abdul Shaikh & ors.*** (1998(2) Bom. C.R. 235) ;

(4)***Shohrab Vali Mohamed v. Inamuddin s/o. Mohamed Kamil,*** (AIR 1999 Bombay 322);

(5)***Rikhiram Pyarelal and anr. vs. Ghasiram Dukalu,*** (AIR 1978 MP 189).

5. Mr. Bhobe, learned Counsel appearing for respondent No.1, at the outset, submitted that the application filed by the petitioner herein was not maintainable under Order 23, Rule 3 C.P.C. According to the

learned Counsel, the ratio of the Judgments relied upon by the petitioner is attracted in the present case. The learned Counsel further submitted that under Order 23, Rule 3, the consent decree can be set aside on the grounds like fraud, misrepresentation, etc. but it is not possible to set aside a part of the decree on the ground that the consent terms contain a clause which was not agreed upon by one party. According to the learned Counsel, such a challenge is not available to a party under Order 23, Rule 3 C.P.C. Even on merits, the learned Counsel submitted that the petitioner is not entitled to any relief, having regard to the findings given by the Addl. District Judge while passing the impugned Order. According to the learned Counsel, no interference is called for in exercise of Article 227 of the Constitution of India against the impugned Order.

6. Since Mr. Bhobe, learned Counsel appearing on behalf of respondent No.1 has challenged the very maintainability of the application filed by the petitioner under Order 23, Rule 3 CPC, it would be appropriate to deal with the same before considering the other submissions made on behalf of the parties. Order 23, Rule 3 C.P.C. reads as under :

> **"3. Compromise of suit. -** Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or

> compromise [in writing and signed by the parties], or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith [so far as it relates to the parties to the suit, whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit]:
>
> [Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks lift to grant such adjournment.]:
>
> [Explanation. - An agreement or compromise which is void or voidable under the Indian Contract Act, 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this rule.]"

The question, therefore, which arises in the present petition is whether in terms of proviso and explanation to Order 23, Rule 3, an application for modification of one clause of the consent terms filed pursuant to which the consent decree is passed, is maintainable under Order 23, Rule 3 CPC. The proviso to Order 23, Rule 3 provides that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but no

adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, things fit to grant such adjournment. Bare reading of the said proviso makes it clear that it is only when adjustment and satisfaction is alleged by one party and denied by the other side, the question of setting aside the consent decree arises. It is only in those cases where the consent terms, as a whole, on the ground of fraud, misrepresentation or on similar grounds are challenged, then the Court has to decide the issue. I am unable to accept the submission of Mrs. Agni that in an application under Order 23, Rule 3, a party can seek modification of a clause in the consent terms and consequently that part of the Decree on the ground that the same was not intended or agreed by the parties. If argument of Mrs. Agni is accepted, in a suit or in an appeal where consent terms are filed and consequently a consent decree is passed, any party thereto will be entitled to file an application under Order 23, Rule 3 C.P.C. for modifying a clause in the consent terms and consequently that part of the consent decree on the ground that it was not intended to or was inserted by mistake. If such an interpretation is accepted, the same would lead to strange result and the finality attached to a consent decree will be rendered otiose. In my view, therefore, the proviso to Order 23, Rule 3 CPC is not available to a party who seeks modification of a clause in the consent terms on the ground that the same was not intended to or that it was inserted by mistake.

7. In so far as explanation to Order 23, Rule 3 is concerned, the same was introduced on account of divergent views taken by different High Courts as to whether the agreements which are voidable under Section 19A of the Contract Act are excluded or not. In the present case, having regard to the facts, in my view, the explanation to Order 23, Rule 3 does not advance the case of the petitioner any further. It is inconceivable that a party can be permitted to file an application for modifying a clause in the consent terms and consequently that part of the consent decree under Order 23, Rule 3 CPC.

8. In support of her submissions, Mrs. Agni has relied upon a number of Judgments which are mentioned above. In ***Banwari Lal's*** case (supra), the Apex Court has held that if the compromise recorded was not lawful within the meaning of Order 23, Rule 3 C.P.C., the order recording the compromise can be recalled. In the said case, the compromise terms were challenged as fraudulent and as such, not lawful and the challenge was to the entire compromise terms.

In ***Ruby Sales and Services (P) Ltd.'s*** case (supra), the Apex Court has held that an agreement on the basis of which the consent decree is drawn, still remains an agreement and it is subject to all rights and liabilities which any agreement may suffer. The Apex Court has further held that having a stamp of Court affixed will not

change the nature of the document and that a compromise decree does not stand on a higher footing than the agreement which preceded it. The Apex Court has further held that a consent decree is a mere creature of the agreement on which it is founded and is liable to be set aside on any of the grounds which will invalidate the agreement. The above observations were made by the Apex Court in the said matter and the issue was whether a consent decree whereunder the title to immovable property is conveyed expressly falls under the definition "conveyance" or an "instrument" under Section 2(l) of the Bombay Stamps Act, 1958.

In ***Shripatrao Dajiso Ghatage's*** case (supra), the Apex Court has held that compromise pursis can be challenged by a party on the ground upon which agreement can be challenged under the provisions of the Indian Contract Act. In the said case, challenge to the compromise pursis was thrown on the ground that defendant No1 who was 85 years old was short of hearing and had not heard the words of the learned trial Court regarding the compromise and he nodded his head under an impression that the suit was adjourned to the next date. In the said case also the challenge was to the entire compromise terms.

In ***Shohrab Vali Mohamed's*** case (supra), the petitioner who was the defendant in the suit, denied knowledge of compromise terms and the Court record showed that some fraud had been played in the matter. The learned Single Judge of this Court ordered thorough

investigation in the matter. In the said case the challenge was on the ground of fraud.

In ***Rikhiram Pyarelal's*** case (supra), the learned Single Judge of Madhya Pradesh High Court held that a mistake in sale deed as to description of property can be rectified and oral evidence to prove the mistake is admissible. It is, thus, clear that the ratio of none of the Judgments relied upon by the learned Counsel for the petitioner is applicable in the present case. In the present case, the petitioner seeks modification of a clause in the consent terms on the ground that the same was not intended to by the parties.

9. I, therefore, hold that the application filed by the petitioner before the Addl. District Court, South Goa, Margao was not maintainable under Order 23, Rule 3 CPC and, therefore, the Addl. District Judge, was justified in dismissing the application.

10. In so far as the submissions made on merits by the learned Counsel are concerned, I deem it appropriate not to deal with the same since I have held that the application filed by the petitioner was not maintainable under Order 23, Rule 3 CPC and, therefore, the question of dealing with submissions on merits does not arise at all. In my view, this is not a fit case in which jurisdiction under Article 227 of the Constitution has to be exercised by this Court to set aside the impugned

Order.

11. In view of the above discussion, I do not find any merit in the present petition. Rule is accordingly discharged. No order as to costs.

A.P. LAVANDE, J.

ssm.